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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

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In the Matter of	)	
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Streamlining Broadcast EEO Rule and Policies,	)	**MM Docket No. 96-16**
Vacating the EEO Forfeiture Policy Statement	)	
and Amending Section 1.80 of the Commission's	)	
Rules To Include EEO Forfeiture Guidelines	)	

To: The Commission

RESPONSE TO OPPOSITION TO PETITION FOR RECONSIDERATION

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Petitioners television religious broadcaster Radiant Life Ministries, Inc., WLXI TV, Greensboro, North Carolina, and radio religious broadcaster New Covenant Educational Ministries, Inc., WNCM FM, Jacksonville, Florida, file the following memoranda in response to the memoranda filed in opposition to their Petition for Reconsideration.

No substantive objections have been filed in response to this submitted petition. The Lutheran Church Missouri-Synod v. FCC, 1998 WL 168712 (D.C. Cir. 1998), decision affirmed the points made in that Petition. The Petition for Reconsideration should, therefore, be granted.

II. THE EFFECT OF THE *LUTHERAN CHURCH* DECISION

The decision by the D.C. Circuit in Lutheran Church Missouri-Synod v. FCC, 1998 WL 168712 (D.C. Cir. 1998), declared the Federal Communications Commission's Equal Employment Opportunity rules to be unconstitutional. 1998 WL 168712 at 9 ("We therefore conclude that its EEO regulations are unconstitutional and cannot serve as a basis for its decision and order in this case"). Likewise, it was the understanding of the Petitioners that the Order and Policy Statement, FCC 98-19, released February 25, 1998, published in the Federal Register on March 9, 1998 (63 Fed. Reg. 11376), concerned sections (b) and (c) of 47 C.F.R. § 73.2080, pertaining to the Commission's EEO rules. Admittedly, certain sections of the Order and Policy Statement are ambiguous in this regard, but taken *in pari materia*, the Order and Policy Statement seems to actually modify only the preexisting FCC EEO rules.

To that extent, the Petition for Reconsideration has been mooted out by the subsequent D.C. Circuit decision striking down *in toto* the underlying EEO rules which the Order and Policy

Statement sought to modify.[1] Unless and until the Lutheran Church decision is reversed on appeal, the FCC's EEO rules and reporting requirements cannot constitutionally be applied to broadcasters in general, and religious broadcasters in particular. *See e.g.*, Lutheran Church, 1998 WL 168712 at 4 ("And the remedial reporting conditions, which require the Church to keep extremely detailed employment records, further aggrieve the Church by increasing an already significant regulatory burden").

Thus, the condition that religious broadcasters file various EEO forms to substantiate compliance with the now-defunct EEO requirements no longer exists. It was this micro-management of religious broadcasters' hiring decisions which most concerned Petitioners. For the time being, such requirements are inherently unconstitutional, and therefore, they are unenforceable.

The Lutheran Church Court remanded the case back to the FCC to consider the constitutionality and applicability of subsection (a) of 47 C.F.R. § 73.2080. As the D.C. Circuit held in this regard:

> To be sure, we have held only that the Commission's EEO program requirements are unconstitutional; therefore, our decision does not reach the Commission's non-discrimination rule which King's Garden interprets. See 47 C.F.R. § 73.2080(a). But our opinion has undermined the proposition that there is any link between broad employment

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[1] To this extent, the opposition arguments concerning the Administrative Procedures Act requisites being fulfilled here are not only meaningless, they are myopic. The D.C. Circuit characterized the Commission's rather unique process in adopting this Order and Policy Statement as "novel," and stated: "the Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize."1998 WL 168712 at 5. Given this plain language by the Circuit Court, not to mention the extensive precedent concerning what constitutes sufficient notice and comment under the APA, it is difficult to understand the arguments justifying the obvious circumvention of the APA here. How, for example, can the adoption of this "policy statement" fulfill the requisites of the APA for the adoption of a *rule* when it "does not bind the Commission to a result in any particular case"? *Id.*

> regulation and the Commission's avowed interest in broadcast diversity. We think, therefore, that the appropriate course is to remand to the FCC so it can determine whether it has authority to promulgate an employment non-discrimination rule.

Id., 1998 WL 168712 at 9.

The Court called into question whether the necessary factual predicate had been established to substantiate the "diversity" rationale as it had been applied to the Lutheran Church. In finding the "diversity" rationale implausible, the Court noted that the "Commission never defines exactly what it means by 'diverse programming.'" Lutheran Church, 2298 WL 168712 at 11. The Court found it significant that: "[n]or did the Commission introduce a single piece of evidence in this case linking low-level employees to programming content." *Id.* at 13, in the context of justifying the "diversity" rationale.

Without any evidence to support diversity, the Court was left with the Commission's internally inconsistent explanation upholding the "diversity" rationale, which the Court rejected outright:

> The Commission reprimanded the Church for preferring Lutheran Secretaries, receptionists, business managers, and engineers precisely because it found these positions not 'connected to the espousal of religious philosophy over the air.' Yet it has defended its affirmative action rules on the ground that minority employees bring diversity to the airwaves. The FCC would thus have us believe that low-level employees manage to get their 'racial viewpoint' on the air but lack the influence to convey their religious views. That contradiction makes a mockery out of the Commission's contention that its EEO program requirements are designed for broadcast diversity purposes. The regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny.

1998 WL 168712 at 13. It is clear from this ruling that the Commission is tasked on remand with two responsibilities. First, the Commission is tasked with defining the term "diversity" if it proposes to retain this as a rationale for regulation at all. *See id.* at 11. Second, the Commission is tasked with determining "whether it has authority to promulgate an employment non-discrimination rule." *Id.*

at 13. The Court made it clear that *any* justification upholding the present non-discrimination rule would "be subjected to detailed judicial inquiry." *Id.* at 10 (citation omitted).

Thus, pursuant to Lutheran Church case, the viability of the 47 C.F.R. § 73.2080(a) non-discrimination rationale must be substantiated by a factual showing by the Commission that there is at least a rational, if not compelling, factual basis for this underlying regulation. That showing on remand has yet to be made, and the ACLJ is more than willing to assist the Commission in outlining the type of record which ACLJ believes is necessary for subsection (a) to pass constitutional muster.[2] Until the Commission has gone through this reconsideration process as required by the Court, however, this subsection remains unsubstantiated, and therefore, questionably constitutional. Certainly, the Commission must fulfill the requirements of the Court's Order prior to attempting to implement this remaining portion of the rule.

Because the Lutheran Synod decision takes precedence over the rulemaking at issue here, Petitioners also believe that the Commission is tasked with justifying subsection (a) before it can even consider the extenuating Order and Policy Statement's viability as it pertains to subsection (a) (assuming that any portion of the Order and Policy Statement actually pertained to this section of the rule in the first place). Accordingly, the Commission would be putting the cart before the horse to now uphold the validity of the Order and Policy Statement prior to substantiating the underlying regulation that it is supposed to modify (again, assuming that it modifies this portion of the rule).

Stated simply, if 47 C.F.R. § 73.2080(a) is an *ultra vires* assertion of authority, then any following modification of that regulation is also *ultra vires*. Petitioners respectfully suggest that the

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[2] Counsel for the ACLJ already made this offer of assistance to develop such a record to legal counsel for the National Association for the Advancement of Colored Poeple/Rainbow Push Coalition.

Commission take the steps to rectify this situation in their proper order. First, by establishing the necessary record to demonstrate the necessity for the non-discrimination policy. *Then*, if deemed necessary, by adopting a new Order or "rule" pertaining to all religious broadcasters.

It is inevitable that any attempt to enforce 47 C.F.R. § 73.2080(a) prior to such a process would necessarily be challenged by the effected broadcaster as an *ultra vires* act pursuant to the Lutheran Church decision. Nor could the Commission rely on its own internal administrative procedures in such a case to justify its interests after the issuance of a Hearing Designation Order against a religious broadcaster. The Supreme Court has repeatedly ruled that administrative procedures need not be exhausted before bringing a federal civil rights action. Patsy v. Board of Regents of State of Florida, 457 U.S. 496 (1982). Consequently, it is in the best interests of both the FCC and the broadcasting community to substantiate the foundational 47 C.F.R. § 73.2080(a), before even reexamining what (if anything) remains of the Order and Policy Statement.

After such reconsideration of 47 C.F.R. § 73.2080(a), if a new overlaying policy is going to be implemented with regard to religious broadcasters, then such a policy will have to *fully* comply with statutory and constitutional requirements. Assuming *arguendo* that the Commission decided to adopt such a new policy, it would still have to comport with the standards set forth in Corporation of Presiding Bishops v. Amos, 483 U.S. 327 (1987), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). Under these standards, the government must show a compelling justification for regulation of the internal hierarchical structure of a religious organization. As previously stated in the original Petition, the present Order and Policy Statement lacks even a rational basis for the EEO reporting requirements of religious broadcasters, thus failing the Amos and RFRA standards.

Conclusion -

The Lutheran Church decision undercuts all of the proposed EEO regulatory requirements of religious broadcasters set forth in the Order and Policy Statement. Assuming *arguendo* that some portion of that Order and Policy Statement remains by virtue of 47 C.F.R. § 73.2080(a), then the FCC is tasked by the Lutheran Church decision to *first* reconsider whether 47 C.F.R. § 73.2080(a) remains viable, before attempting to sustain the viability of the progeny Order and Policy Statement. Therefore, Petitioners' request to reconsider the adoption of the Order and Policy Statement has been superceded. For all practical purposes the Order and Policy Statement no longer exists, and that which may remain is presently unenforceable. Petitioners therefore request that the Commission withdraw this ineffective Order and Policy Statement, and reconsider what actions need to be taken with regard to religious broadcasters (if any) after the Commission has considered whether it has the authority to regulate pursuant to 47 C.F.R. § 73.2080(a) in the first place.

Respectfully submitted,

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May 19, 1998

CERTIFICATE OF SERVICE

I, Glinda M. Corbin, Office Manager in the Law Office of Colby M. May, hereby certify that I have caused to be sent, this 19th of May 1998, via First Class U.S. Mail, postage prepaid, a true and correct copy of the foregoing RESPONSE TO OPPOSITION TO PETITION FOR RECONSIDERATION to the following:

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